Wimpey Minerals USA, Inc. *and* United Steelworkers of America, AFL–CIO–CLC. Cases 4–CA–21675, 4–CA–22085, and 4–RC–18062

March 21, 1995

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On April 18, 1994, Administrative Law Judge Frank H. Itkin issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in opposition to the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Wimpey Minerals USA, Inc., Annville, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the election held on May 21, 1993, in Case 4–RC–18062 is set aside and that this case is severed and remanded to the Regional Director for Region 4 for the purpose of conducting a new election.

[Direction of Second Election omitted from publication.]

Timothy J. Brown, Esq., for the General Counsel.
Stephan J. Boardman, Esq., for the Respondent.
John B. Gabrick, Esq., for the Charging Party.

DECISION

FRANK H. ITKIN, Administrative Law Judge. Unfair labor practice charges and amended charges were filed in the above proceeding on May 5 and September 15, 1993, and on January 24, 1994. A consolidated unfair labor practice complaint issued on February 18, 1994. Thereafter, on February 22, 1994, the Regional Director for Region 4 of the Board issued an order in related Case 4–RC–18062, concluding that Petitioner Union's objection and the challenged ballots filed in that representation proceeding raise substantial and material issues of fact to be resolved at a hearing; the issues raised in the representation proceeding are common to and closely track the issues raised in the above unfair labor practice proceeding; and therefore the two proceedings should be consolidated for hearing, ruling, and decision. The parties have since resolved by stipulation various issues raised in the consolidated unfair labor practice and representation proceedings and, as stipulated, the only issues now remaining for decision are whether or not Respondent Employer violated Section 8(a)(1) and (3) of the National Labor Relations Act by telling an employee during mid-April 1993 that he was not permitted to attend ''a campaign meeting'' because of his union sympathies and by denying overtime benefits to employees Robert Paine, Robert Tonini, and Robert Weinzierl on some three to six occasions from mid-April to May 21, 1993, because they supported and assisted the Union; and, further, whether the Employer, by this conduct, also interfered with the holding and conducting of a fair and free election in the related representation case. (See Tr. 5–18, and G.C. Exh. 5, received in evidence by stipulation.)

A hearing was held on the issues thus raised in Lancaster, Pennsylvania, on March 9, 1994, and on the entire record in these consolidated proceedings, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

Respondent Wimpey Minerals is admittedly an employer engaged in commerce and the Charging Party Union is admittedly a labor organization as alleged. The Union filed a representation petition in Case 4–RC–18062 on March 17; a Stipulated Election Agreement was approved by the Regional Director on March 31; and a Board-conducted election was held on May 21, 1993. Of approximately 145 eligible unit voters, 51 votes were cast for the Union, 10 votes were cast for an intervening labor organization,[1] and 70 votes were cast against the participating labor organizations.

[1] We leave to the compliance stage of this proceeding the issue of whether the employees excluded from campaign meetings held outside of their regular work hours should be awarded backpay calculated on a ''straight time'' or ''overtime'' basis.

Member Cohen notes that the violations found here involve both an announced policy of excluding union supporters from meetings *and* the implementation of this policy. The policy resulted in a loss of benefits to those union supporters. Thus, this case is governed by *Delchamps, Inc.*, 244 NLRB 366, 367 (1979). The cases cited by the Respondent that hold that an employer may exclude union supporters from meetings held during working time are inapposite. Id. at 367 fn. 8. In addition, Member Cohen recognizes that union opponents were also excluded from the meetings. However, the policy was explained to employees solely in terms of the exclusion of union supporters. In these circumstances, the explanations and the meetings sent a message that would tend to interfere with Sec. 7 rights.

Member Stephens also notes that finding a violation here is not inconsistent with his dissenting opinion in *Comet Electric*, 314 NLRB 1215, 1216 (1994), in which he concluded that the employer's conduct of an antiunion meeting during overtime hours without compensating all employees for attending was not objectionable conduct. In that case, neither attendance at the after-hours meeting nor compensation for overtime during the meeting was linked in any way to union sentiments.

Members Stephens and Truesdale agree with Member Cohen that the cases cited by the Respondent concluding that an employer may exclude union supporters from meetings held during working time are inapposite. *Delchamps, Inc.*, supra.

[1] The Regional Director noted in his report on challenged ballots and objection, dated August 12, 1993, that on June 16, 1993, following the representation election, the intervening labor organization

Continued

Robert Paine, employed by Respondent Employer from 1988 to 1993 and previously employed at the same location by Bethlehem Steel and Broyhill & Associates from 1973 to 1988, testified, by way of background, that he had been involved there in a prior unfair labor practice case. He had been unlawfully discharged while employed by Broyhill & Associates and was ''returned to work . . . when Wimpey was in control.'' See *Broyhill & Associates*, 296 NLRB 904 (1989). He noted that ''most of the Management . . . were common'' in the transition from Broyhill & Associates to Wimpey Minerals. In addition, Paine also noted that he had been involved in union organizational efforts during the 1988, 1992, and 1993 union campaigns at the facility. He ''was the representative from the Steelworkers on [the] plant site . . . trying to get the vote.''

Paine recalled that during April 1993, he became aware that the Employer ''was holding campaign meetings with its employees.'' His ''foreman, Ron Popp, told [him] that they [the Employer] were going to have a meeting, but I [Paine] was not allowed to attend. Everybody else was mandatory, but for me, I wasn't allowed to go.'' Paine explained:

> [His coworkers] went to the meetings and I [Paine] went home. And, of course, they sort of poked fun at the idea that I wasn't permitted to go.

This ''meeting'' was held ''after [his] shift''; unlike coworkers who attended this meeting, he was not ''paid overtime for that day.'' ''More such campaign meetings'' were held by the Employer and

> [coworkers] were told each time when the meetings were to be held. And I [Paine] was told that I was not permitted to attend.

There were about four to six such meetings and he was not ''paid for the time that any of the meetings were held.''[2]

Kenneth Wanamaker, an employee, testified that he attended about three ''such campaign meetings'' at the Employer's facility. The Employer ''posted the names of the employees that were to attend at specific times'' at or near ''the time clock.'' Separate ''posted lists'' of employees, dated April 21 and 22, 1993, stated: ''Some team members are not on this list as they were not invited by [Company Vice President Robert] Furlong. If you have any questions see me.'' (See G.C. Exhs. 3 and 4.)

In addition, Wanamaker recalled that ''at one meeting'' an employee ''asked'' Company Vice President Furlong,

> why Bob Paine and some of the others weren't allowed to attend the meetings, and Mr. Furlong said that he felt it wasn't necessary for them to be there, because he knew which way they were going to vote during the election, and there was no sense trying to persuade them any differently.

Robert Tunini, an employee, testified that he has been a member of the Union for some 23 years and was involved in union organizational efforts at the Employer's facility during 1988, 1989, and 1990. He has also been chairman of the Union's grievance committee, its shop steward, chairman of its job evaluation committee, chairman of its productivity committee, and has engaged in ''several other'' union-related activities. His Employer was informed of his ''past Union offices.'' He admittedly did not ''have a role'' in the 1993 union organizational campaign.

Tunini recalled that during April 1993,

> I [Tunini] was approached by my foreman [who] explained that they [the Employer] were going to be holding meetings, and for a reason that [he did not know] . . . I would not be allowed to go to the meetings.

Later, after the second or third such meeting, Tunini was told by his foreman that he ''would be allowed to come out and work while the meetings were going on.'' There were subsequently ''two more meetings'' and Tunini was given ''permission'' to attend but he chose not ''to come out for the overtime for those two meetings.'' Tunini claimed that ''if permission [had been] granted'' for him to attend the first two meetings he ''would have been paid overtime.''[3]

Robert Weinzierl, an employee, testified that he was ''active'' during the Union's 1992 organizational effort at the Employer's facility. He served as an observer for the Operating Engineers in that election. He recalled that during April 1993, his foreman, after having a conversation with his line supervisor, said to him: ''Ed Banefield called and said that we [the Employer] were having a meeting and that you [Weinzierl] were not invited.'' Weinzierl asked ''why he wasn't invited,'' and was told by his supervisor that ''he didn't have no idea.'' Later, as Weinzierl further testified, he spoke with Company Vice President Furlong, and they had the following conversation:

> Mr. Furlong came in and said to me [Weinzierl] . . . that he heard that I wanted to be invited to his meeting, [and] I told him I never said that. . . . [A]ll I wanted to know was why I wasn't invited to the meeting. And he told me that he knew that I was for the Union and the way I was [and] he didn't think he could change my mind. So why should he pay me to go to the meeting when he couldn't change my mind. . . . [H]e asked about the Union, why I think we would need a Union. . . . I said about the fairness. Then he asked me if I wanted to go to the meeting. I said to him that he made the decision the first time, he could make it the second time.

There were some five or six such meetings which he did not attend. He was not ''paid for the time other employees were

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''disclaimed interest in representing the employees in the unit'' and ''will no longer be considered a party to this proceeding.'' (See G.C. Exhs. 1(L) and 5.)

[2] On cross-examination Paine explained that he ''would have received overtime had he gone to the [initial] meeting'' because he was ''working a 12-hour shift'' and would thus receive ''overtime'' for the time ''beyond the 12-hour shift.'' Counsel for the Employer asserted (Tr. 32):

> The employee [Paine] was not invited to several of the meetings, although he was invited to one of the meetings. And he also was not present at work during the course of one of the series of meetings.

[3] Tunini apparently did attend the last Employer meeting. See Tr. 45–46.

attending.'' He did in fact attend ''the last meeting'' and was ''paid overtime'' for attending.[4]

Robert Furlong testified that he was vice president of production for Broyhill & Associates and he later became executive vice president, chief executive officer, and senior vice president of Respondent Employer. He has since resigned effective March 14, 1994. He recalled that in the past 4 or 5 years there have been four representation elections at the Employer's facility, the last one being on May 21, 1993. The Employer, during the 1993 representation campaign, held ''five series of meetings'' with its employees. Employees attending these meetings were paid their ''normal hourly rate'' or ''overtime'' if they were on ''overtime hours.''[5] In addition, Furlong recalled that ''the positions of various employees regarding the question of unionization'' were ''fairly well known.'' Furlong had decided during the 1993 representation campaign that those employees ''who had expressed views favoring and those who had expressed views opposing'' union representation would not be ''invited'' to the meetings. According to Furlong, ''For those employees that had already expressed very strong opinions either way, I didn't feel I should spend my time with them.

Respondent's Exhibit 1 assertedly contains ''the postings'' for ''Company meetings'' and shows which employees were invited to attend. Employee Weinzierl was admittedly ''not invited'' ''to the first meeting.'' Following the ''first meeting,'' Furlong spoke with Weinzierl. According to Furlong,

> Mr. Weinzierl wanted to know why he had not been invited to the meeting. I told [him] that his position was well known and that I didn't see any reason that I should spend my time talking to him about the Union, and that was the reason I was not inviting him to the meeting. . . . He said it was unfair that I had not invited him to the meeting. . . . I told him that if he really felt it was unfair he could just come to future meetings. . . . He was invited to the next meeting but did not show up for that meeting. Therefore, he was left off of the two meetings because he didn't want to come. Then he was directed to show up at the fifth meeting.

Respondent Exhibit 2 is assertedly a ''list of the names of people at the plant that have made their position known as far as . . . having or not having a Union'' and ''shows whether they were or were not invited to the meetings.'' In addition, Furlong acknowledged that ''the statement was made at different meetings,'' ''when somebody would ask,'' that various employees ''weren't invited because I didn't feel I had to spend time talking to them because I knew where they stood.'' Furlong did not, however, then explain to the employees that this ''policy'' ''was being applied to both pro-Union and anti-Union position people.''[6]

Discussion

Section 7 of the National Labor Relations Act guarantees employees the ''right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,'' as well as the right ''to refrain from any or all such activities.'' Section 8(a)(1) of the Act makes it an unfair labor practice for an employer ''to interfere with, restrain, or coerce employees in the exercise of'' their Section 7 rights. The ''test'' of ''interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed . . . [t]he test is whether the employer engaged in conduct, which it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.'' See *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946). And, Section 8(a)(3) of the Act, in turn, forbids employer ''discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.''

Under Section 7, an employee clearly has the right to publicly commit himself or herself in favor of or against union representation. Consequently, where an employer, as here, admittedly treats employees in a disparate manner with respect to their terms and conditions of employment because they have publicly committed themselves in favor of or against union representation, the employer thereby engages in conduct which tends to impinge on employee Section 7 rights. Further, an employer, by this disparate conduct, also engages in proscribed discrimination with respect to terms and conditions of employment to encourage or discourage union activities of employees. Accordingly, Respondent Employer, in the instant case, by admittedly engaging in such conduct, violated Section 8(a)(1) and (3) of the Act as alleged.

However, the credible and essentially undisputed evidence of record here provides a broader basis for finding proscribed coercive and discriminatory conduct. Thus, employee Weinzierl, a known union supporter, credibly testified that, when he asked management ''why'' he ''wasn't invited'' to the Employer's meetings opposing union representation, he was apprised that management ''knew that [he] was for the Union and . . . didn't think [it] could change [his] mind.'' The Employer therefore declined to ''pay'' him ''to go to the

[4] On cross-examination, Weinzierl recalled that ''we were on 12-hour shifts on the days of the meetings.'' Weinzierl also recalled that ''after [his] meeting with Mr. Furlong,'' his supervisor, Banefield, ''told [him] that [he] could attend'' the Employer's meetings. He added: ''It was after the second or third [meeting]. I'm not sure.'' He later explained that he was ''allowed'' by the Employer to attend ''after the second'' meeting and he ''chose not to attend the others because [he] didn't want to get involved with it.'' As noted above, he in fact did attend the ''last meeting.''

[5] Furlong explained that ''for the three people . . . involved'' in these proceedings'' ''overtime'' would be ''over 12 hours in a day or over 40 hours in a week.''

[6] The evidence of record recited above, insofar as pertinent to a resolution of the issues raised here, is essentially uncontroverted and undisputed. Further, the testimony of Paine, Wanamaker, Tunini, and Weinzierl, as detailed above, is in significant part mutually corroborative and is also substantiated in significant part by admissions or acknowledgments of Furlong. And, relying also on demeanor, I find the above testimony of Paine, Wanamaker, Tunini, and Weinzierl to be complete, reliable, and trustworthy. On the other hand, I find the testimony of Furlong to be at times incomplete and unclear. Insofar as the testimony of Furlong conflicts with the above testimony of Paine, Wanamaker, Tunini, and Weinzierl, I am persuaded that the testimony of the latter witnesses more completely and reliably reflects the pertinent sequence of events.

meeting.'' Likewise, employee Paine, a known union supporter, credibly explained:

> [His coworkers] went to the meetings and I [Paine] went home. And, of course, they sort of poked fun at the idea that I wasn't permitted to go.

Employee Tunini, another known union supporter, was similarly denied an ''invitation.'' And, employee Wanamaker credibly recalled that ''at one meeting'' an employee ''asked'' management,

> why Bob Paine and some of the others weren't allowed to attend the meetings, and [Company Vice President] Furlong said that he felt it wasn't necessary for them to be there, because he knew which way they were going to vote during the election, and there was no sense trying to persuade them any differently.

Management concededly made no attempt to explain fully to its assembled employees that it was applying this disparate treatment equally to both known prounion and antiunion employees.

The plain message to the Employer's work force from this gambit was that only those employees who management felt could be persuaded to vote against the Union would be afforded this opportunity for additional compensation. Such conduct plainly tends to interfere with employees' freely exercising their rights under the Act, in violation of Section 8(a)(1). Further, such disparate treatment of employees also runs afoul of Section 8(a)(3) of the Act. In sum, I find and conclude that Respondent Employer violated Section 8(a)(1) and (3) of the Act by telling an employee that he was not permitted to attend a campaign meeting because of his union sympathies and by denying benefits to employees Paine, Tonini, and Weinzierl because they supported and assisted the Union, as alleged.[7] In addition, I find and conclude that the Employer, by this coercive and discriminatory conduct, prevented the holding of a fair and free representation election in Case 4–RC–18062 and therefore the Union's objection is sustained and the election held on May 21, 1993, should be set aside.

CONCLUSIONS OF LAW

1. The Charging Party Union is a labor organization and Respondent Employer is an employer engaged in commerce as alleged.

2. Respondent Employer violated Section 8(a)(1) and (3) of the Act by telling an employee that he was not permitted to attend a campaign meeting because of his union sympathies and by denying benefits to employees Paine, Tonini, and Weinzierl because they supported and assisted the Union as alleged.

3. The unfair labor practices found above affect commerce as alleged.

4. Respondent Employer, by the above coercive and discriminatory conduct, prevented the holding of a fair and free representation election in Case 4–RC–18062 and therefore the Union's objection is sustained and the election held on May 21, 1993, is set aside.

REMEDY

To remedy the unfair labor practices found above, Respondent Employer will be directed to cease and desist from engaging in the conduct found unlawful or like or related conduct and to post the attached notice. Affirmatively, Respondent Employer will be directed to make whole employees Paine, Tonini, and Weinzierl for any loss of earnings they may have sustained by reason of Respondent Employer's coercive and discriminatory conduct as found above, with interest, as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, Respondent Employer will be directed to preserve and make available to the Board or its agents on request all payroll records and reports and all other records necessary to determine backpay and compliance under the terms of this decision and Order. Finally, with respect to the consolidated representation proceeding, the election held in Case 4–RC–18062 will be set aside and the Regional Director will conduct a new election when he deems the circumstances permit the fair and free choice of a bargaining representative.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Wimpey Minerals USA, Inc., Annville, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that they are not permitted to attend representational campaign meetings conducted by the Employer because of their union sympathies, and discriminatorily denying benefits to employees because they supported and assisted the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole employees Robert Paine, Robert Tonini, and Robert Weinzierl for any loss of earnings they may have sustained by reason of its coercive and discriminatory conduct, with interest, as provided in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

[7] As noted infra, Respondent Employer will be directed to make whole employees Paine, Tonini, and Weinzierl for any loss of earnings they may have sustained by reason of Respondent Employer's coercive and discriminatory conduct as found above. Consequently, I need not determine here whether the above employees were in fact denied straight time or overtime benefits on the particular dates of the scheduled meetings or, further, on how many occasions such unlawful conduct occurred resulting in a loss of such benefits. These are matters which are best deferred to, if necessary, compliance proceedings.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Post at its facility in Annville, Pennsylvania, copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENEDED that the election held in Case 4–RC–18062 be set aside and the Regional Director conduct a new election when he deems the circumstances permit the fair and free choice of a bargaining representative.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell our employees that they are not permitted to attend representational campaign meetings conducted by the Employer because of their union sympathies.

WE WILL NOT discriminatorily deny benefits to our employees because they supported and assisted the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole employees Robert Paine, Robert Tonini, and Robert Weinzierl for any loss of earnings they may have sustained by reason of our coercive and discriminatory conduct, with interest.

WIMPEY MINERALS USA, INC.